commenced his action in the Court of a Judge. Section 13 (c) reads as follows :—

> Where a written law repeals in whole or in part any other written law, then, unless the contrary intention appears the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed.

Section 7 of the Rent and Charged Land (Restriction) Enactment, 1940 did not take away the common law right of a landlord to commence proceedings for ejectment but it placed a restriction on his right to exercise it. The order of the Board did away with that restriction and, although section 12 of the Control of Rent Ordinance, 1948 has a similar provision requiring the permission of the Board before any application is made to a Court for an order of ejectment, section 13 of the Interpretation and General Clauses Ordinance, 1948 keeps alive the permission previously given.

The plaintiff-appellant must however comply with any other legal provisions restricting his right to recovery of possession which were in force at the date of his commencing his action. In other words he must prove that his case comes within paragraphs (a) to (m) of sub-section (1) of section 13 of the Control of Rent Ordinance, 1948. He admits that he cannot do so, and I would therefore dismiss this appeal with costs.

Appeal Dismissed.

S. GOVINDASAMY v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J., Russell, J. and Briggs, J.) July 25, 1948]

[Federation of Malaya — Crim. Appeal No. 28 of 1948]

Criminal Procedure Code, Ss. 184, 197, 198 and 422 — Trial with the aid of assessors — Necessity of Judge giving judgment — Omission to do so is not an irregularity which can be cured under S. 422 of the Criminal Procedure Code.

In this case the accused was tried for murder. At the end of the case the assessors gave their opinion that the accused was guilty of murder. The learned trial judge in his note recorded "Assessors without retiring both find accused guilty of murder" The record did not show that the trial judge gave any judgment and that there was positive agreement between the trial Judge and the assessors. The record only showed that the trial Judge passed sentence of death following the opinion of the assessors that the accused was guilty of murder.

Held, (1) that as the learned trial Judge had not complied with the provisions of Section 198 (i) of the Criminal Procedure Code, the conviction and sentence must be quashed; (2) that the omission in this case to comply with the mandatory provisions of the Code was not a mere irregularity which can be cured by recourse to Section 422 of the Criminal Procedure Code.

Cases referred to :—

(1) *Ng Peng Choon v. Public Prosecutor* (1947) M.L.J. 87.

(2) *Joseph v. The King* (1948) A.C. 215.

CRIMINAL APPEAL.

R. Ramani for the Appellant.

F. C. Cooke (Federal Counsel) for the Respondent.

The judgment of the Court of Appeal was given by :—

Willan, C. J. : — This is an appeal against the purported conviction of the appellant by the High Court at Ipoh for the murder of Manickam s/o Ramasamy on the 15th day of September, 1947.

The trial took place before a Judge, with the aid of two Assessors, in accordance with the provisions of sub-section (i) of section 184 of the Criminal Procedure Code, which is as follows :—

> In all cases where the punishment of death is authorised the accused shall be tried with the aid of assessors.

At the close of the evidence the learned trial Judge summed up to the Assessors in accordance with section 197 of the Criminal Procedure Code, which reads :—

> When the case for the defence and the reply (if any) of the officer conducting the prosecution are concluded, the Court may sum up the evidence for the prosecution and defence and shall require each of the assessors to state his opinion orally and shall record such opinion.

In accordance with the provisions of that section the Assessors gave their opinions that the appellant was guilty of murder and their opinions were duly recorded by the learned trial Judge.

In addition to complying with the provisions of section 197, the trial Judge must comply with the provisions of sections 198 and 199. Those provisions are as follows :—

> 198. (i) If the Court agrees with the opinion of both Assessors, or where the Assessors are of different opinions with the opinion of one assessor, the Court shall give judgment accordingly.
>
> (ii) If the Court is unable to agree with the opinion of both assessors, or of the one remaining assessor as provided by section 188, the proceedings shall be stayed and a new trial held with the aid of fresh assessors.
>
> 199. If the accused is convicted the Court shall pass sentence according to law.

Hence, if the trial Judge agrees with the opinion of both Assessors where they are of the same opinion, or with the opinion of one Assessor where they are of

different opinions, it is mandatory on the trial Judge to do two things :—

(1) he shall give judgment accordingly — section 198 (i). That is, where he agrees with the opinion of both Assessors, or with the opinion of one Assessor where the Assessors are of different opinions, the trial Judge must himself, following the opinion of both Assessors or the opinion of one Assessor, as the case may be, convict or acquit the accused.

(2) Sentence the accused where his judgment is one of conviction — section 199.

In this appeal the requirements of section 198 (i) have not been complied with because the record does not show that the learned trial Judge gave any judgment. Nor does it fulfil the requirement laid down by this Court in the case of *Ng Peng Choon v. Public Prosecutor*[1], that the record must show that there was positive agreement between the trial Judge and both Assessors or one Assessor. The record in this appeal merely shows that the trial Judge passed sentence of death following the opinion given by both Assessors that the accused was guilty of murder. The actual note on the record of the opinion of the Assessors is :—

> "Assessors without retiring both find accused guilty of murder".

and no where on the record does it appear that the Judge agreed with the Assessors or that he convicted the accused.

It is no doubt possible, even probable, that if the learned trial Judge had complied with the provisions of the Criminal Procedure Code just mentioned, he would have reached the same opinion as the Assessors and have given judgment accordingly. That, however, is a matter of conjecture.

The omission to comply with those mandatory provisions of the Code is not a mere irregularity which can be cured by recourse to section 422 of the Code.

Following the decision of the Privy Council in the case of *Joseph v. The King*[2], where a somewhat similar set of circumstances arose and the conviction therein quashed, we allow this appeal and quash the conviction and sentence.

We order a new trial and pending that new trial the appellant is remanded in custody.

Appeal Allowed. New Trial Ordered.

SATHASIVAM AND 2 OTHERS v. PUBLIC PROSECUTOR

[App. Crim. Juris. (Storr, J.) August 3, 1948]
[Ipoh — Criminal Appeal No. 50 of 1948]

Penal Code Ss. 34 and 381 — Theft as servants — Accomplice — Meaning of accomplice.

In this case the first and second appellants were convicted of theft as servants of ceiling fans and the third appellant was convicted of assisting in the disposal of the fans. At the trial, one Manikam was called as prosecution witness and he gave evidence that the two appellants had discussed plans for the removal of the fans from the store where they were kept with him. Manikam reported the plot to a Police Inspector who told him to "carry on" and he would arrange to have the wrongdoers brought to book. On appeal it was argued **inter alia** (1) that the witness Manikam was an accomplice and his evidence should not have been accepted without corroboration; (2) that there was no evidence that the first appellant had removed the fans.

Held, (1) that a witness who has made himself an agent for the prosecution before the actual commission of the offence is not an accomplice; (2) that by virtue of Section 34 of the Penal Code the first appellant was liable for the act done by the second appellant in furtherance of their common intention; (3) that on the facts the only evidence against the third appellant was one of suspicion and he should not have been called on for his defence.

Cases referred to :—

(1) *Reg. v. Mullins* 3 Cox's Cases 526.

(2) *Karim Bakhsh v. Crown* I.L.R. 9 (Lahore) 550.

(3) *R. v. Bickley* 2 C.A.R. 53.

(4) *Reg. v. Dowling* 3 Cox's Criminal Cases 509.

(5) *Emperor v. Chatterbhug Sahu* 38 I.L.R. (Cal) 96.

CRIMINAL APPEAL FROM DISTRICT JUDGE.

M. N. Cumarasami for the 1st Appellant.

2nd Appellant in person.

M. S. Mahendran for 3rd Appellant.

M. G. Neal (Federal Counsel) for Respondent.

Storr, J. : — There are 3 Appellants in this case. I will deal firstly with the appeal of the 1st and 2nd Appellants.

The facts briefly were that the 2 Appellants were employed as Overseer and Checker, respectively, by D.C.R.E. at the Kamunting Hospital site. At that site was a store, the key of which was apparently under the control of the 2 Appellants. In that store were a number of ceiling fans, and on the afternoon of 9th March, 1948, certain of the fans, 10 it is alleged, were found to be missing. The 2 Appellants and another man, also employed at the site, named Hosey, were charged with the theft of the missing fans.

The evidence of the prosecution stated that on 29th February, 1948, the 2 Appellants, the man Hosey and one Manikam, also employed on the site, discussed plans for the removal of the fans from the store in lots of 10. At this meeting it was decided that the fans should be removed on the 7th March, 1948. Now Manikam, who had just been released from prison after serving a sentence for theft, stated